NTSB Order No.
EM-18

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 27th day of October 1971.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

RAFAEL E. P. MARTINEZ

Docket ME-18

OPINION AND ORDER

The appellant, Rafael E. Perez Martinez, has appealed from the decision of the Commandant affirming the revocation of his Merchant Mariner's Document No. Z-952264-D1 and all other seaman's documents for misconduct while serving, under the authority of his documents, as a fireman/watertender aboard the SS OVERSEAS ANNA, a merchant vessel of the United States.[1]

The Commandant's action followed an appeal taken by the appellant (Appeal No. 1802) from the initial decision of Coast Guard Examiner Howard T. Long on May 22, 1969.[2] Based upon the record of a full evidentiary hearing held before him, the examiner found that the allegations of wrongdoing stated in the misconduct charge were proved. His findings were that on April 4, 1969, while the vessel was at sea, the appellant assaulted two of the ship's officers "by pushing the Master with his hands" and "by grabbing the chief mate around his neck," while attempting to prevent the seizure by the chief mate of a parcel found underneath the pillow of appellant's bunk. It is undisputed that the chief mate was conducting a search for marijuana under the direct supervision of the master, in the stateroom occupied by appellant and another

[1]The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The appeal to this Board is authorized under 49 U.S.C. 1654(b)(2) and is governed by the Board's rules of procedure set forth in 14 CFR 425.

[2]Copies of the decisions of the examiner and the Commandant are attached hereto.

seaman named Leonard Gerson. Both seamen were present in the room along with the chief engineer and the second mate, who were standing by as additional members of the search party. It is also undisputed that no marijuana or other contraband was found.

Further, in the body of his opinion, the examiner found that appellant, after gaining possession of the parcel and while warding off the officer's attempts to retrieve it, knocked the chief mate across the bunk and struck the master twice with his elbow. Finally, he found that appellant had thrown the parcel overboard, out of an open porthole.

All factual findings were derived from testimony by the two officers affected and the chief engineer.[3] The examiner accepted the testimony of all three officers as stating the true facts, finding that they "agreed in almost every respect, except in a few details which are not important...." The appellant and Gerson testified that no violence whatsoever occurred and that appellant did not throw a parcel overboard during the search of their quarters. The examiner rejected their evidence, giving as his only reason the fact that "Neither could account for why the three licensed officers would testify falsely."

These indications of the reasons for the examiner's credibility determinations are confirmed by his statement of record. Before adjourning the hearing, he said:

> "I can't imagine that three officers of long experience would come in and falsely accuse a seaman of doing what is alleged to have been done here. For that reason, I find the charges proved, both specifications and the charge. Just what the order is going to be, I don't know, but it is going to be outright suspension of some kind, maybe revocation." (Tr., p. 51.)

Despite the greater emphasis placed on a suspension order at this time, the examiner concluded in his decision that revocation was the appropriate sanction, because of appellant's "violent actions," to which he added the offense of interfering with the two officers in the performance of their duties.

The appellant was not represented by an attorney at the

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[3]A logbook entry of the OVERSEAS ANNA citing appellant's offenses was offered in evidence and appellant's representative made timely objections to its admissibility. Although the objections were not sustained, the examiner appears never to have formally received the document in evidence.

hearing. After indicating that he did not wish one, he was allowed to proceed as he chose, with his roommate, Gerson, serving as his counsel. This ill-conceived strategy has changed during the appeals process, wherein he has secured the services of an attorney. Not surprisingly, in his first contention raised on appeal to the Commandant, appellant claims to have been denied due process because of the inadequate representation afforded to him at the hearing.

The record discloses that Gerson, while well intentioned, was wholly incompetent to serve as a legal advocate. He had no plan of defense, failed to object as the ship's officers were led through their testimony, or to pursue and follow up certain glaring inconsistencies that would have helped the defense. It is nonetheless the case that appellant made a free choice in the matter. There is no showing that he was acting under constraint, financial or otherwise, or was incapable of making an intelligent choice. We agree with the Commandant that appellant has no cause to complain, on the ground asserted here, that his hearing lacked due process.

As we view the remaining contentions advanced by the appellant, the Commandant was required to consider two basic questions:

(1) Whether appellant was afforded a fair and impartial adjudication of contested issues by the examiner; and

(2) Whether the examiner properly considered the evidence and other relevant factors in imposing the sanction.

We do not agree with the Commandant's disposition of these basic questions and, in the interest of administrative due process, we believe his order should be modified.

The record does not support the examiner's determination that the ship's officers gave consistent testimony in all important respects. The testimony of the chief engineer differed materially from the other two officers. He observed the entire chain of events, but did not see the master being pushed, or the chief mate being grabbed around the neck (Tr. p., 89). Nor did he testify that the chief mate was thrown across the bunk. It was evident even from the testimony of the other two officers that these specific actions did not constitute menacing conduct on appellant's part. The bodily contacts, as they described them, were instantaneous and without harm.

The chief mate stated that appellant had placed a strangle hold around his neck; however, it was in response to a leading

question.[4] We are therefore not satisfied with the witness' answer because he had previously testified that appellant's assault on his neck was with the right hand alone. (Tr. p. 33.) We find it difficult to envision this one-handed strangle hold since simultaneously appellant was allegedly wrestling the parcel from the chief mate's grasp as well as fighting off the master. A thorough review of the record reveals that the testimony of the three ship's officers was consistent in only one respect--that appellant struck the master twice with his elbow.[5] There was agreement that these acts were done forcefully while the master tried to keep appellant from throwing the parcel overboard. Yet, this one area of consistency casts doubt on the validity of the examiner's adjudication, since he based his credibility finding on the full consistency of the three officer's testimony. Moreover, it appears that the examiner made little, if any, effort to weight the consistent testimony of the officers against the denials of appellant and Gerson.

The Commandant interpreted the examiner's credibility holdings as indicating that he had "noted ... the substantial consistency of the testimony of these three witnesses with no appearance of a motivation which could lead to a suspicion of collision (sic)." We have already noted significant inconsistencies, and the failure of appellant to show a motive for collusion among the officers is not an adequate substitute for assessing the credibility of the two seamen on the merits.

It appears that the examiner was unduly influenced by the mere status of the ship's officers as opposed to the seamen. We cannot say that the examiner improperly assessed the credibility of witnesses appearing before him. We do say that the reasons stated for these determinations, both on the record and within his decision, were inadequate. His actions in this regard were not conducive to a fair and impartial adjudication of the issues in this case.

Appellant has two contentions concerning the sanction imposed. The first is that the examiner was influenced by the suspicion that marijuana was contained in the parcel, and by appellant's alleged activities as a supplier of marijuana aboard the ship. The Commandant conceded that he would carefully weigh the possibility

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[4]The question was: "Did he hit you or did he grab onto you like, in other words, did he strike you with his arm or did he grab you like a strangle hold." (Tr. p. 24.)

[5]Based on the chief engineer's account of the complete sequence of events on page 38 of the hearing transcript.

of such undue influence "in a close case," but would not indulge in that "speculation" here.[6]

The second contention is that error was committed by the examiner in not considering appellant's good prior record of service in the merchant marine as a factor in his favor. The Commandant's regulations governing suspension and revocation proceedings for misconduct, require that the examiner's order "is only given after consideration of the prior record of the person charged ...."[7] Despite this clear breach of procedure (conceded as such by the Commandant), which could only be prejudicial to the appellant, the Commandant made his own interpretation, as follows: "What the Examiner tacitly declared was that on the merits of the instant case he found revocation the appropriate order whatever the prior record might have been and however clear it was." This does not comport with the examiner's statement of record, after hearing all the evidence, that he was considering a suspension order, or "maybe revocation."

Upon review of the record, it is our belief that the examiner's decision was infested with error to an extent not curable through interpretations supplied by the Commandant. Rather, the cure would lie in remanding the case for a new hearing with corrective instructions to the examiner. At a second hearing, appellant would have effective assistance of counsel; the circumstances surrounding the officer's search for contraband in appellant's room (dimly perceived in this record) would be fully litigated and a determination made of its reasonableness; appellant would be afforded proper notice of all offenses charged against him by correction and amendment of the complaint in this case;[8] the examiner would be instructed not to assess credibility solely in reference to the relative status of witnesses appearing before him; and appellant's prior record would be given adequate consideration. In brief, a remand of this case by the Commandant would have served the interest of administrative due process.

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[6]In his opposing brief on this appeal, the Commandant makes clear that he does not consider appellant to have been charged with possession of marijuana, or that a finding was made that he had marijuana in his possession. He asserts that revocation is appropriate because "Assault and battery upon ship's officers, especially in the performance of their duties, is a most serious offense."

[7]46 CFR section 137.20-155(a)(5).

[8]46 CFR section 137.20-65.

We are persuaded that the elbow assaults by appellant upon the master were established by substantial evidence of a probative and reliable character. The disciplinary sanction for this offense would be severe, even though it would be terminated at this point after a period approaching 2 1/2 years. The scale is weighted on the one side by appellant's misconduct and the length of time he has served to date under the sanction imposed. The other side is weighted by the prejudicial failure of the examiner to consider proper mitigating factors and the failure to remand the case based on other meritorious contentions raised before the Commandant. We believe that a rough balance is struck.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein;

2. The revocation order of the Commandant be and it hereby is modified to provide for a retroactive suspension of appellant's seaman's documents; and

3. The retroactive suspension, starting on June 3, 1969, shall terminate as of the date of service appearing on the face of this order.

LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order. REED Chairman, filed the attached dissent.

REED, Chairman, DISSENTING:

I believe that, within the entire context of this case, the offenses of this appellant were serious enough to warrant revocation. I would affirm the Commandant's decision.

(SEAL)